

Summary: The Plaintiff filed an action in federal district court, alleging discrimination, reprisal under Title VII, and violations of the Indian Preference Act, Americans with Disabilities Act, and the Rehabilitation Act of 1973. The Defendants filed a motion for summary judgment. The Court granted the motion, finding that some of the Plaintiff's discrimination claims are barred by res judicata and that the Court lacks subject matter jurisdiction over the remaining claims because the Plaintiff was neither an employee of the Bureau of Indian Affairs nor the federal government.

Case Name: Baker v. Department of Interior, et al.

Case Number: 4-08-cv-77

Docket Number: 59

Date Filed: 4/7/10

Nature of Suit: 442

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION**

Bernadette Baker,)

Plaintiff,)

vs.)

Dirk Kempthorne, Secretary, United States)

Department of Interior, or his predecessor-)

in-office; Bureau of Indian Affairs, Louis)

Dauphinais as Middle School Principal)

and in his individual capacity,)

Defendants.)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Case No. 4:08-cv-077

Before the Court is the Defendants' "Motion for Summary Judgment" filed on September 17, 2009. See Docket No. 46. The Plaintiff filed a response in opposition to the motion on September 24, 2009. See Docket No. 48. For the reasons set forth below, the Court **GRANTS** the Defendants' motion.

I. BACKGROUND

This case arises out of an employment dispute that began in 2003. In 2003, the plaintiff, Bernadette Baker, was a candidate for the position of elementary school counselor with the Bureau of Indian Education (BIE) at the Turtle Mountain Elementary School in Belcourt, North Dakota. The BIE was formerly known as the Office of Indian Education Programs within the Bureau of Indian Affairs. The position had an opening date of November 26, 2003, and a closing date of December 11, 2003. Baker submitted a timely application for the position and, along with two other applicants, was placed on the “certificate of eligibles.” All three candidates were interviewed by a panel which consisted of Patty Gourneau, assistant principal; David Gourneau, acting principal; and Peggy Keplin, an elementary school counselor.

The position was offered to Gaileen Davis. On December 16, 2003, the Turtle Mountain School Board approved Davis’ selection; however, Davis declined the offer of employment. After Davis declined the offer, Donna Parsien, business manager, advised the School Board that since the Turtle Mountain Elementary School had not received its special education funding for the year, she recommended the elementary school counselor position not be filled. In March 2004, the Turtle Mountain School District received special education funding but the elementary school continued to experience financial problems so the School Board decided not to fill the counselor position until the 2004-2005 school year.

On March 29, 2004, Baker filed a “complaint of discrimination” with the United States Department of Interior alleging that her non-selection as the elementary school counselor was motivated by race and age discrimination. See Docket No. 47-1. More than 1 ½ years later, on December 15, 2005, EEOC Administrative Judge Ronald Taoka of the Denver District Office

dismissed the complaint and found that Baker had failed to show that she was discriminated against on the basis of race or age. See Docket No. 47-2. The EEOC adopted the decision and issued its “Final Order” on January 27, 2006. See Docket No. 47-3. The EEOC sent a copy of the agency decision to Baker by certified mail, return receipt requested. Baker acknowledged receipt of the decision and final order on February 1, 2006. See Docket No. 47-4. The final order provided that Baker may file a civil action in an appropriate United States District Court within ninety (90) days. The 90-day time period expired on May 2, 2006.

On May 9, 2006, after the expiration of the 90-day time period to pursue a civil action, Baker filed a complaint in the federal district court of North Dakota. See Baker v. Lynn Scarlett, et al., Civil No. 4:06-cv-039, (D.N.D. 2006). The complaint was dismissed on October 4, 2006. Baker v. Scarlett, 2006 WL 2927842 (D.N.D. Oct. 4, 2006) (unpublished). Baker never appealed the order of dismissal to the Eighth Circuit Court of Appeals. Thus, the first charge of race and age discrimination arising out of Baker’s non-selection as elementary school counselor in December 2003 and January 2004 has been resolved in a final judgment on the merits.

On June 18, 2004, the agency posted another vacancy for the school counselor position at the Turtle Mountain Elementary School. David Gourneau, who had subsequently been named principal, served as the selecting official. Gourneau was aware that Baker had filed previous EEO complaints. Baker, Cheryl LaFloe, Marlene Schroeder, and Kerri Davis were included on the “certificate of eligible” candidates. On or about July 9, 2004, Gourneau selected Cheryl LaFloe to fill the vacant counselor position. The agency alleged that it first selected LaFloe based upon the strength of her resume, but it was later discovered that it was obligated to conduct interviews. Following the interviews of all applicants, LaFloe was again selected to fill the vacant elementary school counselor

position. On March 11, 2005, Baker filed another formal complaint of discrimination alleging that she was not selected because of her prior EEO activity. See Docket No. 47-8.

Years later, on September 24, 2007, Administrative Judge Henry Hamilton III recommended a finding of retaliation and concluded that Baker was entitled to employment as a counselor at the Turtle Mountain Elementary School. See Docket No. 47-8. The ALJ concluded that Baker was also entitled to an award of back pay and \$500 in non-pecuniary damages. The administrative judge concluded that there was “little evidence of compensatory damages” arising from the conduct of the agency and concluded that the sum of \$500 would sufficiently compensate Baker for damages caused by the agency’s conduct. See Docket No. 47-8. The Department of Interior adopted the decision on November 13, 2007. See Docket No. 47-9. The decision was never appealed.

Based on the findings of Administrative Judge Hamilton, the agency placed Baker in a “substantially equivalent” position in accordance with 29 C.F.R. § 1614.501(a)(3). That “substantially equivalent” position was as a second grade teacher for the 2007-2008 school year. Baker was paid at the same rate that an elementary school counselor would have been paid. At her request, Baker was transferred to a 5th grade classroom for the 2008-2009 school year. Even though Baker was placed in a “substantially equivalent” position because she prevailed in her non-selection case, she was required to serve a probationary period in that position as set forth in 29 C.F.R. § 1614.501(b)(1)(ii). The probationary period for teachers is eighteen (18) months. Thus, Baker’s second formal charge of discrimination and retaliation arising out of her non-selection as elementary school counselor in 2004 has been resolved in a final judgment on the merits.

On April 27, 2005, Baker filed another formal EEOC complaint of discrimination on the basis of her race, age, and reprisal for prior EEO activity after she had been issued a “Not at Your

Duty Station” memorandum on February 18, 2005. Baker also alleged that she had been discriminated against based on her race, age, and reprisal when, on April 6, 2005, her request to attend a methamphetamine clandestine drug lab workshop scheduled for April 5-6, 2005, in Belcourt, was denied. Baker further asserted that she had been discriminated against based on her race, age, and reprisal, when she was excluded from the following committees: Alternative Learning Center Coordinator, School Reform Team, Scheduling Committee, Test Coordinator, and Project Achieve. See Docket No. 47-10.

The claims of discrimination were investigated by the EEOC and a decision was issued on August 2, 2006, by Administrative Judge Barbara L. Henderson. See Docket No. 47-5. Administrative Judge Henderson made the following findings: that Baker worked at the Turtle Mountain Elementary School in Belcourt, North Dakota, as a middle school counselor; that the Turtle Mountain Elementary and Middle Schools are operated by both the local school district and the Bureau of Indian Affairs (BIA), and some teachers and support staff are funded by the BIA and some are funded by the school district; and that Baker was an employee of the Belcourt Public School District and was not an employee of the BIA or the federal government. See Docket No. 47-5. The administrative judge concluded that Baker was a private employee, not a federal employee. The EEOC issued a final order on October 23, 2006. See Docket No. 47-6. The final order stated that Baker “was neither an employee of the Bureau of Indian Affairs or the federal government.” Baker filed an administrative appeal on November 16, 2006, and the EEOC decision was affirmed on September 10, 2008. See Docket No. 47-15.

The EEOC found that at the time of events giving rise to the complaint, Baker had worked as a middle school counselor at the Turtle Mountain Community Elementary School in Belcourt,

North Dakota. Although Baker was supervised by a BIA employee, that individual had no authority with respect to hiring or firing. Id. The findings of the EEOC reveal that Baker never disputed that she was an employee of the Belcourt Public School District. The EEOC noted that Baker did not contend, either in her response to the agency's motion for a decision without a hearing or on appeal, that she was either an employee of a federal agency or an applicant for employment with a federal agency. Id. The EEOC ultimately determined that since Baker was neither a federal employee nor an applicant for federal employment, the complaint was properly dismissed because it failed to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). Id. Baker was informed that she had a right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date she received the decision. This third formal charge of discrimination and retaliation was never appealed after the EEOC decision was affirmed on September 10, 2008. As noted, the EEOC concluded that Baker was at all times an employee of the Belcourt Public School District and was not an employee of the BIA or the federal government.

On September 2, 2008, and before the previously-mentioned EEOC decision was affirmed, Baker filed a complaint in the United States District Court of North Dakota and was represented by attorney Bernice C. Delorme. See Docket No. 1. On October 22, 2008, Delorme filed a motion to withdraw. See Docket No. 8. The Court granted Delorme's motion to withdraw on October 24, 2008. See Docket No. 12. Baker has been representing herself in this litigation since that time. Attorney Delorme is the subject of several disciplinary proceedings in the State of North Dakota.

Suffice it to say that the complaint is less than a model of clarity. There are allegations of discrimination based upon age, race, physical handicap, reprisal under Title VII, violations of the Indian Preference Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. The

twenty-page complaint is essentially a legal brief which attempts to outline the litany of discrimination charges that Baker has initiated since 2003 against the Bureau of Indian Affairs and Louis Dauphinais, the middle school principal. Many of the “allegations” set forth in the complaint concern charges of discrimination which were addressed and resolved by the Equal Employment Opportunity Commission years ago, and concern charges which resulted in final decisions that were never appealed.

It appears that the present complaint arises out of an EEOC charge of discrimination filed by Baker on August 29, 2006, which alleged discrimination based on age, physical handicap, race, and reprisal, but are charges which were never investigated by the agency or the EEOC. See Docket No. 48-13. The record reveals that Baker was an employee of the Belcourt Public School District until at least May of 2007 when her contract was non-renewed by the school district for the 2007-2008 school year. See Docket Nos. 48-9 and 48-10. It appears that Baker remained at the school in some capacity as a teacher or counselor until on or about April 24, 2009. The following “Declaration of Duane Poitra” is unrefuted and reveals the following concerning Baker’s employment:

1. I am an adult, competent, and have personal knowledge of the facts contained herein.
2. I am employed by the Belcourt Public School District #7, Belcourt, North Dakota, as the business manager. In that role, I have access to the employment records for the employees of the Belcourt Public School District.
3. I have been employed by the Belcourt Public School District for approximately 19 years. Of those 19 years, I have served as business manager for 12 years.
4. During the 2004-05 and 2005-06 school years, Bernadette Baker was employed by the Belcourt Public School District as a counselor in the Turtle Mountain Middle School. As a public school district employee, Ms. Baker’s

supervision was designated by Roman Marcellais, assistant superintendent for the public school district.

5. During the 2006-07 school year, Bernadette Baker was employed by the Belcourt Public School District as a counselor in the school district's alternative high school. As a public school district employee, Ms. Baker was directly supervised by Roman Marcellais, assistant superintendent for the public school district.
6. The Belcourt Public School District's school board made the decision to not renew Ms. Baker's contract on May 3, 2007.
7. The decisions regarding assignment to a particular school are made by the school district and employment contracts for the school district's employees are made by the district's school board.

See Docket No. 47-13.

It appears that while Baker was employed as a counselor for the Belcourt Public School District, she worked in a building that was owned by the BIA. Some school staff are considered to be employees of the BIA and some are employees of the school district. However, there is no dispute that from 2004-2007, Baker was an employee of the Belcourt Public School District and not the BIA. Baker has never pursued any claims against the Belcourt Public School District as a result of her non-renewal in 2007 or her reassignments to other school buildings during her years of employment.

II. LEGAL DISCUSSION

There are a multitude of claims of discrimination in the complaint which is far from a model of clarity. The twenty-page complaint attempts to assert a litany of discrimination charges dating back to December 2003. Baker alleges that her non-selection as the elementary school counselor in December 2003 and January 2004 was motivated by race and age discrimination. The record clearly

reveals that those issues were resolved in the “Final Order” issued by the EEOC on January 27, 2006 (Docket No. 47-3), and a dismissal of the federal court action Baker pursued in federal court in the District of North Dakota which occurred on October 4, 2006. The order of dismissal was never appealed to the Eighth Circuit Court of Appeals and *res judicata* applies since these discrimination claims were previously presented to the EEOC and the federal district court and the decisions are final.

With respect to Baker’s claims of discrimination based on race, age, and retaliation under Title VII, the record clearly reveals that during the 2004-2005, 2005-2006, and 2006-2007 school years, Baker was employed by the Belcourt Public School District as a counselor in the Turtle Mountain Middle School and later at the school district’s alternative high school. See Docket No. 47-13. The Belcourt Public School District made the decision to non-renew Baker’s contract on May 3, 2007. Id. It is undisputed that decisions regarding assignment to a particular school and the status of employment contracts for school district employees are made by the Belcourt Public School District and the school board, not the Bureau of Indian Affairs. Id. Further, the EEOC concluded in its final order on October 23, 2006, that Baker “was neither an employee of the Bureau of Indian Affairs or the federal government.” See Docket No. 47-6. The EEO decision was affirmed on September 10, 2008. See Docket No. 47-15. The final decision of the EEOC was never appealed. In summary, Baker’s allegations of discrimination against the defendants based upon age, race, and reprisal under Title VII are subject to dismissal because Baker was, at all relevant times, an employee of the Belcourt Public School District rather than the Bureau of Indian Affairs. Although the BIA may have owned the buildings where the schools were located, Baker was without question at all times a school district employee. The relationship between the Belcourt Public School District and

the BIA is confusing at best, but it is clear that Baker was employed by the school district during the time periods which gave rise to this complaint.

Baker has asserted a claim under the Indian Reorganization Act, also known as the Wheeler-Howard Act, 25 U.S.C. § 461. The Indian Reorganization Act does not expressly waive sovereign immunity and Title VII does not confer jurisdiction over an independent claim of a violation of the Act. See Beams v. Norton, 327 F. Supp. 2d 1323, 1330 (D. Kan. 2004). It is well-established that the Indian Reorganization Act does not give rise to a private cause of action or private remedy. Id.; Solomon v. Interior Reg'l Hous. Auth., 313 F.3d 1194 (9th Cir. 2002). The Court lacks subject matter jurisdiction for a private cause of action asserted under the Indian Reorganization Act.

Baker has also asserted claims against the BIA and Louis Dauphinais under the Americans With Disabilities Act, 42 U.S.C. §§ 1201, et seq. (“ADA”), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. The only reference to the ADA is in the caption of the complaint. Baker alleges she suffers from an anxiety disorder and claustrophobia, and she contends the BIA and Dauphinais failed to provide her with reasonable accommodations at school. It is clear and undisputed that the ADA excludes from coverage the United States or corporations wholly owned by the United States. 42 U.S.C. § 12111(5)(B)(I). The ADA only applies to private employers with more than 15 employees, and state and local governments. Further, the ADA does not provide for individual liability, only employer liability. See U.S. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279 (7th Cir. 1995). Thus, the ADA does not apply to the BIA nor does it provide for individual liability as to Louis Dauphinais. As previously noted, Baker was employed by the Belcourt Public School District from 2004-2007. If a valid ADA claim exists, it would need to be pursued against her employer, who was neither the BIA nor Louis Dauphinais. See Docket No. 47-

13. The claims asserted against the named defendants based on the ADA are devoid of merit and subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

The Rehabilitation Act of 1973 is the precursor to the ADA and applies to federal agencies, contractors, and recipients of federal financial assistance. The Rehabilitation Act of 1973, not the ADA, constitutes the exclusive remedy for federal employees alleging disability-based discrimination. Mannie v. Potter, 394 F.3d 977, 982 (7th Cir. 2005); Gardner v. Morris, 752 F.2d 1271, 1278 (8th Cir. 1985). However, Baker was never a federal employee. It is clear and undisputed that Baker was never a federal employee but was at all times an employee of the Belcourt Public School District, a state entity. Baker has failed to state a claim under the Rehabilitation Act of 1973 upon which relief can be granted. If a valid disability claim exists, it would need to be pursued against her employer who is neither the BIA nor Louis Dauphinais.

In summary, the record is clear and undisputed that the plaintiff, Bernadette Baker, was at all relevant times an employee of the Belcourt Public School District and not the Bureau of Indian Affairs or the federal government. The Belcourt Public School District made the decision to non-renew Baker's teaching contract on May 3, 2007. The Belcourt Public School District ultimately determined which school and building Baker would be assigned to, and the status of her employment. Any claims of discrimination or causes of action Baker may have based on race, age, retaliation, disability, or breach of contract would need to be pursued against her employer rather than the BIA or the federal government.

Unfortunately, this case has been plagued with years of delay and inattention on the part of the EEOC as well as Baker's former attorneys. Tribal politics, nepotism, unprofessionalism, and

personality conflicts have also infected the work environment. This has resulted in Baker handling the case pro se which, at this stage, has only served to further compound the confusion. Nevertheless, the record is clear in that no valid claim exists against the BIA or any individual. The Defendants' Motion for Summary Judgment (Docket No. 46) is **GRANTED**.

IT IS SO ORDERED.

Dated this 7th day of April, 2010.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge
United States District Court